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Issue Date: 19 July 2004

Case No. 2003-LHC-2567

OWCP No. 5-111300

In the Matter of

LOZIE H. WILLIAMS,
Claimant
v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Self-Insured Employer

Appearances:
Gregory E. Camden, Esq., for Claimant
Christopher R. Hedrick, Esq., for Employer

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for temporary total disability from an injury alleged to have been suffered by Claimant, Lozie H. Williams, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Hereinafter referred to as the "Act"). Claimant alleges that he was injured while retrieving some tubing and crossing under a large pipe while employed by Employer, and that as a result he is suffering from an injury to his neck.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held on March 4, 2004. (TR).[1] Claimant submitted eleven exhibits, identified as CX 1 through CX 11, which were admitted without objection. (TR. at 8, 52). Employer submitted seven exhibits, EX 1 through EX 7, which were admitted without objection. (TR. at 10, 43). Employer also submitted one exhibit, EX 8, post-hearing, which was admitted. The parties also submitted one joint exhibit, JX 1, which was admitted. (TR. at 7). The record was held open until May 7, 2004, for the submission of post-hearing briefs. (TR. at 123). By letter dated May 6, 2004, counsel for Employer requested an

[1] EX - Employer's exhibit; CX - Claimant's exhibit; and TR - Transcript.

extension of time for filing Employer's brief. Counsel for Claimant did not object, and the request was granted. Both parties have filed post-hearing briefs.

The record was also held open for thirty days from the date of the hearing for Claimant's counsel to provide clarification as to the restrictions issued by Dr. Foer that are contained in Claimant's Exhibit 9. (TR. at 42). The record was also held open for Employer to submit additional calculations regarding the wages of the positions listed in the labor market survey. (TR. at 123).

By letter dated May 13, 2004, counsel for Employer forwarded a report from Barbara Harvey regarding the recalculation of the applicable average weekly wage for the positions identified in the labor market survey to be included as another Employer's exhibit. By letter dated May 13, 2004, counsel for Claimant requested that this exhibit be excluded as he was not provided with the exhibit prior to that time. He also argued that he had already mailed his post-hearing brief to this office, had not had an opportunity to address the exhibit in his brief, and had not had the opportunity to cross-examine Ms. Harvey about the contents of the letter.

Employer's counsel responded in another letter, also dated May 13, 2004, in which he argued he submitted Ms. Harvey's letter in an effort to comply with the request made by the undersigned Administrative Law Judge during the hearing. Employer also discussed that he had been delayed in submitting the report to the undersigned as Ms. Harvey had changed employers since the time of the hearing. (EX 8).

A conference call was held with counsel for both parties and the undersigned on May 20, 2004, regarding the proposed additional exhibit. During the conference call, the letter from Ms. Harvey was admitted into evidence. Claimant was also permitted to file a response to Ms. Harvey's letter by June 1, 2004. By letter dated May 26, 2004, Claimant's counsel submitted a response to the letter.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The following issues are disputed by the parties:

1. Whether Claimant was improperly paid temporary total disability benefits for the period of May 1, 2003, through June 2, 2003, inclusive;

2. Whether Claimant is entitled to temporary total disability benefits for the period of June 27, 2003, through August 5, 2003, inclusive;

3. Whether Employer has demonstrated the availability of suitable alternate employment that Claimant could obtain if he diligently tried;

4. Whether Claimant engaged in a diligent search for suitable alternate employment;

5. If Claimant is entitled only to temporary partial disability benefits, the appropriate compensation rate based upon Claimant's loss of wage earning capacity; and

6. Whether the undersigned Administrative Law Judge has the authority to decide whether Claimant is entitled to reimbursement for mileage incurred in seeking alternate employment, and if so, if Claimant is entitled to such reimbursement.

STIPULATIONS

At the hearing, Claimant and Employer stipulated, and I find:

That an employer/employee relationship existed at all relevant times;

1. That the parties are subject to the jurisdiction of the Longshore & Harbor Workers' Compensation Act;

2. That the claimant suffered an injury to his neck on December 6, 2000;

3. That a timely notice of injury was given by the employee to the employer;

4. That a timely claim for compensation was filed by the employee;

5. That the employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;

6. That the claimant's average weekly wage at the time of his injury was $627.97 resulting in a compensation rate of $448.65;

7. That the claimant was paid temporary total disability benefits from 4/12/01 to 6/5/01; 12/7/01 to 12/9/01; 4/10/03 to 6/29/03; and 8/6/03 to 9/7/03; at the rate of $448.65 per week, and an award can be entered for the following benefits: for the periods of 12/7/01–12/9/01; 4/10/03–4/30/03; June 3, 2003–June 26, 2003, and 8/6/03–9/7/03, and 4/21/01–6/5/01.

(JX 1).

DISCUSSION OF LAW AND FACTS

Hearing Testimony of Claimant

Claimant has worked as a pipefitter for Employer for 23 years. (TR. at 120). Claimant testified that he was injured on June 6, 2000, when he came down off of a ladder to get some tubing. He crossed under a large pipe, rose up, hit his head and "sprung" his neck. The pain he experienced was in his neck and upper part of his back on his right side. (TR. at 20). Claimant's job at the time he was injured required him to work overhead putting in drain pipes for bathrooms on the carrier ships. Claimant was required to lift valves, which weigh, according to Claimant, between fifty and sixty pounds. He was also required to use vibratory tools, such as large grinders and needle guns. (TR. at 49).

He was initially treated at the shipyard clinic for six months until he was referred to a neurosurgeon. (TR. at 21). Claimant was provided three physicians from which to choose. He chose Dr. Skidmore, and later saw another form that had Dr. Skidmore named as his treating physician. Claimant was treated by Dr. Skidmore and was taken in and out of work at various times during 2001 and 2002. (TR. at 21-22).

On April 17, 2003, Dr. Skidmore placed restrictions on Claimant, which restricted Claimant from lifting more than twenty pounds, no vibratory tools, and no overhead work. (TR. at 23, 49). Claimant took the restrictions to the shipyard clinic; however, Employer did not have any work available within those restrictions at that time. (TR. at 23). Claimant agreed that with those restrictions, he could not have performed his regular job. (TR. at 49, 122). Claimant's impression at that time was that he would be put back to work at some point because he was not told that he was fired or to find another job. (TR. at 23). Dr. Skidmore then referred him to Dr. Siegel; Claimant believes that this occurred because Dr. Skidmore detected a problem with his shoulder, and Dr. Siegel was shoulder specialist. Claimant saw Dr. Siegel only once, on April 30, 2003. According to Claimant, Dr. Siegel took an X-ray and sent him back to Dr. Skidmore because Dr. Siegel did not feel that the problem was in Claimant's shoulder, but rather, the problem was in Claimant's neck. (TR. at 24). When Claimant returned to see Dr. Skidmore on May 22, 2003, Dr. Skidmore indicated that Claimant was a "diagnostic dilemma." Dr. Skidmore did not recommend treatment at that time but did conduct another EMG, which came back negative. Dr. Skidmore returned Claimant to work on September 8, 2003. Claimant has not seen Dr. Skidmore since then. (TR. at 25).

Claimant did request a second opinion and was seen by Dr. Foer, who was chosen by the Department of Labor. Upon examination, Dr. Foer found a problem with vertebras number 6 and 7. Claimant testified that he "felt better" after leaving Dr. Foer's office because he felt that something was finally being done about his pain. (TR. at 26-27). Dr. Foer sent Claimant to Dr. Hanson for injections; Claimant had not yet had an injection at the time of the hearing, but stated that the first injection was scheduled for March 19. In the meantime, Dr. Foer assigned Claimant work restrictions. (TR. at 27, 39). Those work restrictions limited Claimant's sitting, lifting no more than twenty pounds, carrying no more than twenty-five pounds, limited pushing, limited pulling, and limited working overhead. (TR. at 40). Claimant agreed that he could not perform his regular job under these restrictions. (TR. at 50, 122).

Claimant testified that he has not been working full duty since September 7, 2003, and that Employer is honoring his restrictions. (TR. at 27-28, 39). Claimant testified that he was still experiencing pain in his shoulder, neck, and arm on the right side, and that the pain was the same as it was in May, 2003. (TR. at 28, 39). Claimant testified that his currently hourly rate is $18.61, and this was the same hourly rate that was in effect in July, 2003. (TR. at 20). Currently, he is working under the restrictions imposed by Dr. Foer. He is working on the carrier instructing new people as they come in. (TR. at 50).

In June, 2003, Claimant was told that he needed to participate in the Job Club,[2] which is located in Newport News, Virginia, approximately three to four miles from the shipyard. (TR. at 28). Prior to starting at the Job Club, Claimant did not look for work anyplace else. (TR. at 39). Claimant lives in Suffolk, Virginia, which is twenty miles from the shipyard. (TR. at 20). Claimant was told that he was to go to the Job Club every morning and that they would help him find a job close to his abilities. During Claimant's first week of attendance at the Job Club, he was tested for his abilities in reading and math and was also taught how to fill out an application and resume. (TR. at 29). During the second week, Claimant reported to the Job Club to pick up his job search assignments, which would sometimes contain only one job and sometimes would contain multiple jobs. After retrieving his assignments, Claimant would go to the businesses and apply for the positions. (TR. at 30).

The job assignments were located in various cities, including Norfolk, Virginia. Claimant recorded his daily mileage between his home and the Job Club, and between the Job Club and the businesses to which he was sent. The mileage was recorded on travel reimbursement forms that were provided by the Job Club. (TR. at 31). The mileage forms were signed by Rebecca Seaford, who Claimant testified worked at the Job Club. Claimant testified that he was told by Ms. Harvey that the forms could be turned in to Worker's Comp, in particular, to Sarah Bradby, which Claimant did. However, Ms. Bradby told Claimant that Employer did not pay for mileage to find jobs or back and forth to the Job Club. Thus, Claimant stated that he had never received any payment for the mileage traveled while participating in the Job Club. (TR. at 32-33).

On or about June 24, 2003, Claimant notified the Job Club that he would not be returning. He went to the Job Club that day to get his job assignment, and while there, he spoke with Ms. Seaford. He testified that he told Ms. Seaford that he "no longer can do the jobs and she told me to try to go do this today and, you know, maybe tomorrow I'll feel better about it." He stated that he went to Preferred Person to apply for a job but was unable to apply because the business was closed. (TR. at 35-36). Claimant called Ms. Harvey and was told to stay there in case they returned. Claimant testified that he stayed there for four hours but no one ever returned. That same day, Claimant was told to apply for a driver position at Checkered Flag. Claimant did not apply for the second Checkered Flag position after leaving Preferred People. (TR. at 119).

[2] This decision and order contains multiple references to both "Job Club" and "Job Start." These phrases refer to the same program and should be understood as such. The term Job Club is used in parts of this decision as that was the term used during as Claimant's testimony and in his post-hearing brief.

Claimant stated that when he had the discussion with Ms. Seaford, he was depressed and was hurting and "just couldn't do it anymore." (TR. at 37). Claimant stated that he was depressed because he did not have a job, and there was no work for him at the shipyard. Claimant made the decision to leave the Job Club, despite Ms. Seaford's warning that his Worker's Comp benefits would be terminated, because "I just couldn't take it no more." (TR. at 37). After leaving the Job Club, Claimant did not look for work elsewhere. (TR. at 39).

Claimant testified that Claimant's Exhibit 4 contains jobs that the Job Club sent him to apply for and for which he actually did apply. Claimant was not offered any of these jobs and further stated that he was not offered work anywhere between May, 2003, and September, 2003. However, Claimant testified that he felt that he could have worked at the shipyard during that time period, doing the job that he is currently performing. (TR. at 37-38).

Claimant also testified as to the results of the labor market survey. Claimant denied that he had the ability to do logarithms, practical algebra, or trigonometry. Claimant did not know the meaning of the word "mensuration." Claimant stated that in his current job, he was not required to read novels, atlases, or encyclopedias, nor was he required to speak before audiences. (TR. at 118-19). Claimant did state that he was required to read diagrams, measure pipes, and put pipes together, sometimes at angles, which required simple math. Claimant denied that he had to weld the pipes together. (TR. at 120-21).

Deposition Testimony of Claimant

Claimant was deposed on January 29, 2004. (EX 1(a)). He testified that he began having problems with his neck and shoulder on December 6, 2000, and had no problems in those areas prior to that time. His problems with his neck and shoulder have remained the same since that time. (EX 1(m)-1(n)). Claimant stated that the clinic sent him to physical therapy, which allowed him to move his shoulder and neck better than before and improved his flexibility. (EX 1(n)).

Claimant testified that he was currently working at the shipyard and returned to work there on September 9, 2003. He stated he was performing the same job that he was doing before and currently had no restrictions. (EX 1(e)). Claimant was experiencing the same neck, shoulder, and arm problems as he was experiencing before. (EX 1(e)-1(f)). Claimant had not returned to Dr. Skidmore's office, but instead sought treatment from Dr. Foer, a neurosurgeon, to whom he was sent by the Department of Labor. (EX 1(f)). Claimant saw Dr. Foer on December 17, 2003. Claimant testified that Dr. Foer had not taken him out of work at that time nor given him any restrictions. Claimant stated that Dr. Foer told him that he thought that his problem was with the sixth and seventh vertebrae and suggested injections. Dr. Foer did not recommend surgery according to Claimant. (EX 1(g)).

Claimant was asked about a list of businesses where he applied for work. He testified that the list was in his own handwriting, that he applied for work at all of the jobs listed, but did not have interviews at any of the businesses. Claimant did not know if any of the businesses were hiring. (EX 1(h)). Claimant stated that he went to these businesses because he was told to do so by the Job Start program. Prior to being sent to these businesses by Job Start, Claimant

testified that he had not looked for work elsewhere. (EX 1(i)). Claimant confirmed that at one point, he told either Barbara Harvey or Rebecca Seaford that he did not want to attend the Job Start program any longer because he was "depressed and stressed out." (EX 1(i)). Claimant did not return to the Job Start program after that day. (EX 1(j)). At some point after that, Claimant spoke with "Barbara" on the telephone and told her that he would not be returning. Claimant testified that "Barbara" told him that not returning to the program could affect his compensation benefits. After that time and until he returned to work at the shipyard, Claimant stated that he did not look for work anywhere else. (EX 1(j), 1(r)).

Claimant stated that he graduated from high school. Claimant has not undergone training anywhere else, except at the shipyard, and has not attended any community colleges. At the shipyard, Claimant went through "'make-up' supervisor training"; that training required him to take written tests, which he passed. (EX 1(k)). Claimant testified that he can generally read the English language and has no problem writing. (EX 1(*l*)).

Claimant's family physician is Dr. Bidwell in Franklin, Virginia; he has been Claimant's family physician for twenty-four years. He currently treats Claimant for depression. (EX 1(*l*)-1(m)). Claimant was currently taking medication for pain in his foot and knee; however, Claimant was under no restrictions due to those problems. (EX 1(m)).

Claimant was questioned about his physical abilities during August, 2003, and was referenced to notes made by Dr. Skidmore regarding Claimant's inability to do daily activities. Claimant testified that he was able to do things such as yard work and wash his car, but that he would have to rest. These activities would also cause him to experience pain and sometimes an increase in his level of pain, depending on his activity. (EX 1(o)-1(q)). Claimant stated that activities such as lifting, overhead work, and using vibratory tools cause an increase in the pain in his neck and shoulder. (EX 1(r)).

Medical Evidence

By letter dated April 11, 2003, Michael J. Weaver, PA-C, informed Dr. Steven Apostoles at the shipyard clinic that Claimant was seen by Dr. Grant Skidmore of Neurosurgical Specialists, Inc., in Norfolk, Virginia, on April 10, 2003. Claimant had returned to Dr. Skidmore's office with continued right neck and right shoulder pain, and he related to Dr. Skidmore that his pain had not changed in the past 1 1/2 years, since he was last seen by Dr. Skidmore. In Claimant's history, it was noted that Claimant had an accident in December, 2000, in which he injured his right shoulder and right neck. At that time, Claimant was evaluated with a myelogram, an MRI, and an EMG, "which showed no neural compression in the cervical spine." Claimant was returned to work. He stated that he had been working full time as a pipefitter, "through considerable pain and with no limitations." Claimant reported occasional numbness in his right fingers, but was taking no medication at that time. Claimant also reported that he felt worse in the morning, but was in pain throughout the day. Claimant voluntarily limited his activity and voiced concerns that he had not improved. Upon neurologic examination, Claimant had a normal gait and good strength. He also had full range of motion in both shoulders but was tender to palpation over his right trapezius muscle. Dr. Skidmore and PA

Weaver recommended a follow-up MRI as well as an MRI of the right shoulder. Claimant was to return in one week for a follow up examination. (CX 1-4).

Claimant was seen by Dr. Skidmore on April 17, 2003, at which time Dr. Skidmore diagnosed cervical myalgia. Dr. Skidmore noted that Claimant could return to work with certain restrictions, specifically, no heavy lifting or carrying exceeding twenty pounds, no overhead work, and no vibratory tools. These restrictions were to remain in place until Claimant was reassessed during the week of April 21, 2003. (CX 1-3; EX 5(a)).

Physician's Assistant Weaver in Dr. Skidmore's office saw Claimant on April 18, 2003. He noted that Claimant had been suffering from right neck pain for some time, and Claimant's statements that the pain was radiating down into his right arm. Claimant brought his MRI scan of his right shoulder and cervical spine to this appointment. In his neurologic examination, PA Weaver found that Claimant had a normal gait and good strength. PA Weaver reviewed the MRI of Claimant's right shoulder and found a small posterosuperior labral tear. He also noted that there was some joint fluid accumulating next to the abnormality, which the radiologist felt was compatible with a small tear. PA Weaver opined that the cervical spine MRI showed "multilevel degenerative disc disease, with a broad based disc osteophyte complex at C6, C7." As to his impression, PA Weaver noted that Claimant appeared to have a right shoulder injury. Both he and Dr. Skidmore recommended that Claimant see Dr. Jack Seigel to assess his problem and for treatment, and Dr. Skidmore would see Claimant for a follow up examination. (CX 1-2).

Claimant was seen by Dr. Jack L. Siegel on April 30, 2003, upon referral from Dr. Skidmore. At that time, he was complaining of right-side neck pain, right trapezial pain, and numbness in the first, second, and third digits of the right hand. Claimant presented a number of MRIs, including one of the cervical spine performed on April 14, 2003. According to Dr. Siegel, this MRI showed "a broad-based disk osteophyte complex at C6-7 which is described to compromise the central canal and mildly effacing the cervical cord. A second smaller right posterolateral disk protrusion is seen at C3-4." Dr. Siegel also noted an MRI study of the right shoulder was performed on April 14, 2003, that "identifies a normal rotator cuff with a small posterosupeior labral tear that was suggested with a very tiny paralabral cyst." Claimant denied glenohumeral pain, but did note a "painless popping from time to time with movements." Claimant also related that he had "no specific trauma to the right shoulder girdle." (CX 3-1).

Upon examination, Claimant had full range of motion of the right glenohumeral joint with a normal rotator cuff examination. (CX 3-1). Claimant's reflex examination was intact at C5 and C6, but was sluggish or non-present at C7. Claimant had a stiff cervical spine with rotational movements, as well as with flexion, extension, and side-to-side bending. Claimant's X-rays were normal. Dr. Siegel's impression was "disk osteophyte at C6-7 and C3-4 primarily." Dr. Seigel suggested to Claimant that he saw no surgical lesion related to his right shoulder, and he did not correlate Claimant's symptoms with his glenohumeral joint or rotator cuff. Dr. Siegel concluded that "I would not chase after the questionable shoulder MRI finding, but would refocus attention to the cervical spine, where it appears on today's examination and history most of his symptoms exist." Dr. Siegel sent Claimant back to Dr. Skidmore. (CX 3-2).

Claimant was seen by Dr. Skidmore on May 22, 2003. Dr. Skidmore noted that Claimant "has been somewhat of an enigma" and was a "diagnostic dilemma." Claimant reported neck and right shoulder pain. Dr. Skidmore noted that Claimant had been sent for an orthopedic evaluation, and that Dr. Seigel felt that there was some pathology that was nonsurgical, but that the focus needed to be on the cervical spine. Dr. Skidmore noted that Claimant had a negative EMG previously, although he had some numbness into his right hand and pain through the right shoulder. Dr. Skidmore performed a neurological evaluation and found no change. Dr. Skidmore sent Claimant for another EMG and wrote that if the EMG was negative, he would have to explain to Claimant that there was nothing else that could be done and would return him to full duty. If the EMG came back positive, Dr. Skidmore noted he would reassess Claimant's situation. (CX 1-1).

Claimant was seen by Dr. Skidmore on August 5, 2003. Claimant was still experiencing right neck and shoulder pain. Claimant had not had his EMG conducted and stated that it had not been scheduled for him. Claimant was not working and stated that he felt his daily activity was inhibited by his pain. Upon neurologic examination, Claimant had a normal gait and good strength in his upper extremities, as well as full range of motion in his right shoulder. Dr. Skidmore and PA Weaver noted the need to see Claimant's EMG, which they ordered. Claimant was to return for a follow-up examination one week later. (CX 1-6).

Michael Weaver, PA-C, completed a form on August 5, 2003, noting that Claimant was seen in Dr. Skidmore's office on that day and was diagnosed with cervical radiculopathy. The form also noted that Claimant was to remain out of work. (CX 1-7).

Claimant was seen by Michael Weaver, PA-C, on September 2, 2003. The diagnosis was noted as cervical pain. PA Weaver completed the form and noted that Claimant could return to full-duty work on September 8, 2003. (CX 1-5).

Dr. Warren H. Foer informed Theresa A. Magyar in the Office of Workers' Compensation via letter written on December 17, 2003, that Claimant was seen in his office on that same date. Dr. Foer noted that this examination was at Ms. Magyar's request. Dr. Foer wrote that Claimant presented with complaints of posterior neck, right shoulder, and intermittent right arm pain and paresthesias, which Claimant related to an injury he suffered on December 6, 2000. Claimant recounted to Dr. Foer that he immediately had pain in his neck and subsequent pain in his right shoulder as well as radiating pain in his right arm and numbness and tingling in his fingers. Claimant also reported his history of treatment with Drs. Skidmore and Siegel. (CX 2-1). Claimant told Dr. Foer that he had been returned to work on August 8, 2003, but continued to have pain. (CX 2-2).

Dr. Foer examined Claimant and found no gibbous or deformity. Claimant's Spurling and Adson maneuvers were negative bilaterally. Claimant had no focal weakness in his motor movements. Claimant had active and symmetrical deep tendon reflexes. His sensory examination "shows some decreased pinprick in the approximately C7 dermatome was reported on the right side." Dr. Foer also reviewed Claimant's cervical spine MRI and found degenerative changes. He also noted some disc protrusion at the C6-7 level, but stated that this did "not appear to be impacting upon the nerve root on the axial images. However, on the

sagittal imaging it does appear to be in a position where it could." Dr. Foer opined that Claimant's pain was coming from the discogenic changes at C6-7. He did not feel that Claimant was a candidate for surgery at that time, but recommended that it would be reasonable to proceed with epidural steroid injections. (CX 2-2).

By letter dated February 11, 2004, Theresa Magyar, Claims Examiner with the Office of Workers' Compensation Programs wrote to Claimant's counsel and to the case manager, Sarah Bradby, that Dr. Foer had evaluated Claimant at the request of OWCP on December 17, 2003. She informed them that Dr. Foer had not provided Claimant with restrictions but had noted a continuing problem that would require treatment. OWCP contacted Dr. Foer to have him provide details of any recommended restrictions. Ms. Magyar wrote that "Dr. Foer has assigned light duty restrictions of limited sitting, limited overhead work and limited pushing/pulling, as well as a 20 pound lifting restriction and a 25 pound carrying restriction." (CX 9-1, 9-2).

A print-out from the Employer's Clinic, dated February 16, 2004, notes that Claimant has permanent restrictions starting February 9, 2004. The restrictions are noted as "limited overhead work; push/pulling. . not to lift >20# or carry >25 #." The form notes that the restrictions were given by Dr. Foer. (CX 11).

Dr. Robert B. Hansen at the Center for Pain Management saw Claimant at the request of Dr. Foer on February 17, 2004. Dr. Hansen recounted Claimant's accident as well as his subsequent treatment with Drs. Skidmore, Siegel, and Foer. Dr. Hansen also noted the various tests that had been performed, including two EMGs and MRIs by Dr. Skidmore and an MRI by Dr. Siegel. Dr. Hansen reviewed the MRIs taken by Dr. Skidmore and found some degenerative changes with some foraminal narrowing; however, Dr. Hansen noted that this was only moderate and was possibly worse on the left. Dr. Hansen also reviewed Dr. Foer's report from December 17, 2003. Claimant related to Dr. Hansen that he was working but that pain made it difficult to perform his job duties; he noted that "very vigorous activity, such as grinding, aggravated his pain" and that his pain was never entirely gone. Claimant also told Dr. Hansen that his pain interfered with other leisure activities and had affected his mood, energy level, and sleep. (CX 10-1).

Dr. Hansen examined Claimant and found "considerable tenderness to palpation in the trapezius muscle on the right." His impression was that Claimant has "chronic radicular pain from a cervical spine injury that occurred at the time of his work injury." Dr. Hansen noted that he would be requesting Claimant's EMG reports. He opined that Claimant's symptoms relate to a C7 radiculopathy and to possible discogenic pain. Dr. Hansen additionally noted that Claimant also appeared to have secondary myofascial pain and "co-morbid difficulties with depression and probably sleep." (CX 10-1). Dr. Hansen recommended that Claimant be started on Ultracet on a regular basis to reduce his overall pain level. Dr. Hansen also prescribed Vicodin to be taken as needed for activity/rescue pain and Topamax for neuropathic pain for the "strong radicular component." Dr. Hansen discussed with Claimant the possibility of adding an antidepressant "to function as an adjunctive analgesic." Dr. Hansen noted his office would make arrangements for trigger point injections to provide short term relief, as well as cervical epidural steroid injections. Dr. Hansen suggested that Claimant could "benefit from a more directed approach such as could be seen with a medial branch block and possibly radiofrequency treatments." Finally, Dr.

Hansen noted that his sleep patterns/habits would also be examined to observe for any disruptions. (CX 10-2).

Section 20(a) Presumption

Section 20(a) of the Act provides a claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 614-15 (1982); *Merrill v. Todd Pac. Shipyards Corp.*, 25 BRBS 140, 144 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170, 174 (1989), *aff'd*, 892 F.2d 173 (2d Cir. 1989). Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the elements of physical harm. *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982). However, as the Supreme Court has noted, "[t]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Indus.*, 455 U.S. at 615. Once the claimant has invoked the presumption, the burden of proof shifts to the employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935).

The parties have stipulated that Claimant's employment is subject to coverage under the Longshore and Harbor Workers' Compensation Act. It is also undisputed that Claimant sustained an injury to his neck on December 6, 2000. (JX 1). Claimant credibly testified that he experienced pain in his neck, shoulder, and arm following the accident, and that he continues to experience pain upon engaging in certain activities. Claimant's medical records confirm his testimony.

Upon consideration of the evidence as well as the stipulations entered into by the parties, I find that Claimant has established a prima facie case for compensation and is entitled to the presumption of Section 20(a) that his condition is causally related to the injury he sustained on December 6, 2000.

Rebuttal of Section 20(a) Presumption

Since the presumption has been invoked, the burden now shifts to the employer to rebut the presumption with substantial countervailing evidence that establishes that the claimant's employment did not cause, aggravate, or accelerate his condition. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976); *Peterson v. General Dynamics Corp*., 25 BRBS 71, 78 (1991); *James v. Pate Stevedoring Co.*, 22 BRBS 271, 273 (1989). Substantial evidence is relevant evidence such that a reasonable mind might accept it as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951); *Consol. Edison Co. v. Labor Bd.*, 305 U.S. 197, 229 (1938).

The employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). *Dearing v. Director, OWCP*, 998 F.2d 1008, at *2, 27 BRBS 72, 75 (4th Cir. 1993) (unpublished) (per curiam); *Steele v. Adler*, 269 F. Supp. 376, 379 (D.D.C. 1967); *Smith v. Sealand Terminal, Inc.*, 14 BRBS 844, 846 (1982). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and the employment. *See Am. Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 817-19 (7th Cir. 1999); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990).

The employer may also rebut the presumption with negative evidence, but again, negative evidence must be "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Swinton*, 554 F.2d at 1083. An employer cannot rebut the presumption on the basis of suppositions or equivocal testimony. *Dewberry v. S. Stevedoring Corp.*, 7 BRBS 322, 325 (1977), *aff'd mem.*, 590 F.2d 331 (4th Cir. 1978). Rather, an employer must show either facts or negative evidence that is both specific and comprehensive to overcome the presumption. If the employer presents specific and comprehensive evidence sufficient to sever the connection between a claimant's harm and his employment, the presumption no longer controls, and the issue of causation must resolved on the whole body of proof. *See Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935); *Volpe v. Northeast Marine Terminals, Inc.*, 671 F.2d 697, 700 (2d Cir. 1981); *Leone v. Sealand Terminal Corp.*, 19 BRBS 100, 102 (1986).

Counsel for Employer stated during the hearing that Employer does contest that Claimant's injury is compensable, but rather, contests the time frame and the extent of Claimant's disability. (TR. at 14). As Employer does not contest that Claimant's injury was not caused by his employment, I therefore find that the presumption of §20(a) is not rebutted, and that the Claimant's injury is compensable under the Act.

Nature and Extent of Disability

Claimant in this case seeks temporary total disability benefits commencing May 1, 2003, through June 2, 2003, inclusive; and from June 27, 2003, through August 5, 2003. Claimant does not contend that he has reached maximum medical improvement; therefore, he is entitled only to temporary compensation. *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 234 (1984). Employer has already paid Claimant temporary total disability benefits from May 1, 2003, through June 2, 2003, inclusive, but now contends that such compensation was improperly paid. However, the analysis remains the same, and the burden remains on Claimant to establish entitlement to temporary total disability benefits for the periods claimed.

Temporary Total Disability

To establish a prima facie case of total disability, a claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 200 (4th Cir. 1984); *Newport News Shipbuilding*

& Dry Dock Co. v. Director, OWCP, 592 F.2d 762, 765 (4th Cir. 1979); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339, 342-43 (1988); *Elliott v. C & P Tel. Co.*, 16 BRBS 89, 92 (1984). A claimant's credible testimony alone, without objective medical evidence, on the issue of the existence of a disability may constitute a sufficient basis for an award of compensation. *Eller & Co. v. Golden*, 620 F.2d 71, 74 (5th Cir. 1980); *Ruiz v. Universal Mar. Serv. Corp.*, 8 BRBS 451, 454 (1978). In addition, a claimant's credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award of compensation notwithstanding considerable evidence that the claimant can perform certain types of work activities. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991).

Claimant testified that at the time of his injury, he was working as a pipefitter, a job which required him to lift valves that weigh between fifty and sixty pounds, use vibratory tools, and work overhead. (TR. at 49, 120). When Claimant was injured on December 6, 2000, he testified that he was retrieving tubing when he crossed under a large pipe and struck his neck and the upper right side of his back. (TR. at 20). Claimant's medical records reveal that on April 17, 2003, Dr. Skidmore placed Claimant under physical restrictions, which consisted of lifting no more than twenty pounds, no use of vibratory tools, and no overhead work. Claimant testified that Employer had no work for him under those restrictions at that time, and that he could not have performed his pre-injury employment under those restrictions. (TR. at 23, 49, 122; CX 1-3).

Claimant also testified that he returned to work with Employer on or about September 7, 2003, but that he is not currently working full duty. He stated that Employer is honoring his restrictions. Claimant stated that he was still experiencing pain in his shoulder, neck, and arm, and that the pain remains as it was in May, 2003. (TR. at 27-28, 39). Currently, he is working on the carrier instructing new people as they come in, and that this job falls under the restrictions imposed by Dr. Foer. (TR. at 50). The restrictions imposed by Dr. Foer in February, 2004, were: limited sitting, limited overhead work, a 20-pound lifting restriction, and a 25-pound carrying restriction. (CX 9-1, 9-2; CX 11). Claimant stated that activities such as lifting, overhead work, and using vibratory tools causes an increase in the pain in his neck and shoulder. (EX 1(r)).

Employer states in its post-hearing brief that it does not disagree with Claimant that Claimant cannot return to his pre-injury employment during the time frames in question. (Employer's Brief, at 14). Counsel for Employer made a similar statement during the course of the hearing. (TR. at 122).

Based upon Claimant's testimony and the evidence presented, I find that Claimant was totally disabled and unable to perform his regular and usual employment due to his work-related injury from May 1, 2003, through June 2, 2003, inclusive, and from June 27, 2003, through August 5, 2003, inclusive. Claimant credibly testified that the use of vibratory tools and working overhead caused an increase in his pain. That Dr. Skidmore placed Claimant under restrictions preventing this type of work in April, 2003, and that Dr. Foer issued similar restrictions in February, 2004, along with the fact that the record contains no evidence that Claimant's condition improved in the interim leads me to conclude that Claimant was unable to perform his

regular and usual employment due to his work-related injury during the periods of May 1, 2003, through June 2, 2003, and June 27, 2003, through August 5, 2003.

Suitable Alternate Employment

As Claimant has made a prima facie showing that he was totally disabled during the aforementioned time periods, the burden now shifts to Employer to show that suitable alternate employment existed during that time period. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 201 (4th Cir. 1984); *Rinaldi v. General Dynamics Corp*., 25 BRBS 128, 131 (1991) (per curiam). If Employer fails to rebut the prima facie case of total disability, Claimant will be considered totally disabled and entitled to temporary total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 334 (1989); *Blake v. Bethlehem Steel Corp*., 21 BRBS 49, 54 (1988).

To establish suitable alternate employment, the employer must show the existence of realistic job opportunities that the claimant is capable of performing, considering his age, education, work experience, and physical restrictions. *Trans-State Dredging*, 731 F.2d at 201 (quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981)). The job opportunities must be located in the relevant labor market. *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380-81 (4th Cir. 1994) (holding that the employer must show availability of employment in the community in which the claimant presently lives). Further, the employer must show the availability of actual, not theoretical, employment opportunities as well as the nature, terms, and pay scales for the alternate jobs. *Manigault*, 22 BRBS at 334 (citing *Thompson v. Lockheed Shipbuilding Constr. Co.*, 21 BRBS 94, 97 (1988)); *Royce v. Erich Constr. Co.*, 17 BRBS 157, 159 (1985); *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024, 1027 (1978).

The employer also carries the burden of showing the reasonable availability of specific jobs within the job market at critical times. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 265 (4th Cir. 1997); *Turner*, 661 F.2d at 1043. The Fourth Circuit has interpreted "critical time" to mean the time "during which the claimant was able to seek work." *Tann*, 841 F.2d at 543. The date on which suitable alternate employment became available is that date upon which Claimant could have realistically secured employment had he made a diligent effort. *Id*. at 542; *Trans-State Dredging*, 731 F.2d at 201 (quoting *Turner*, 661 F.2d at 1042-43). The earliest date on which suitable alternate employment becomes available determines the date on which the extent of a claimant's disability changes, economically and medically speaking, from total to partial disability. *Rinaldi*, 25 BRBS at 103-31 (citing *Director, OWCP v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1990)).

When referencing the external labor market through a labor market survey to establish suitable alternate employment, an employer must "present evidence that a range of jobs exist." *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988). The employer cannot satisfy its burden of showing suitable alternate employment by identifying only one job opening, as "it is manifestly unreasonable to conclude that an individual would be able to seek out and, more importantly, secure that specific job." *Id*. The purpose of the labor market survey is not to find

the claimant a job, but to determine whether suitable work is available for which the claimant could realistically compete. The courts have consistently held that the employer is not required to become an employment agent for the claimant. *Tann*, 841 F.2d at 543; *see also Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2d Cir. 1991). The employer may meet the burden of showing suitable alternate employment by "presenting evidence of jobs which, although no longer open when located, were available during the time claimant was able to work." *Tann*, 841 F.2d at 543.

Alternatively, an employer can establish suitable alternate employment by offering an injured employee a light duty job that is tailored to the employee's physical limitations, so long as the job is necessary to the employer's business and the injured employee is capable of performing such work. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133, 136 (1987); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171, 172 (1986); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986). However, if that job becomes unavailable, then the employer's burden is no longer satisfied. *Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797, 801 (4th Cir. 1999).

Labor Market Survey

A labor market survey was completed by Barbara J. Harvey, Vocational Case Management Supervisor, on September 29, 2003, after Claimant's case was referred to her August 18, 2003, by Sarah Bradby, case manager for Employer. (EX 2(a)). Utilizing the time frame of May 1, 2003, through August 6, 2003, Ms. Harvey found eight positions that she would classify as entry-level that she believed were compatible with Claimant's transferable skills and physical capabilities as outlined by Dr. Skidmore. (TR. at 55, 67, 112; EX 2(b), 2(c)). Based upon the eight positions identified, Ms. Harvey asserted that Claimant has a potential wage earning capacity of $10.10 per hour, or $404.00 per week, and an average wage earning capacity of $6.92 per hour, or $276.80 per week.[3] (TR. at 67; EX 2(b)).

According to the survey, Ms. Harvey took into consideration Claimant's work history as a pipefitter, his transferable skills, education, reported physical capabilities, and her interaction with him during the Job Start program. (TR. at 60; EX 2(b)). Ms. Harvey took the following work restrictions into account: lifting and carrying up to twenty pounds; no vibratory tools; and no overhead work. (TR. at 57; EX 2(c)). She also utilized his resume, sample application, and vocational test results that he completed in the Job Start program. (EX 2(c)). Ms. Harvey used the following resources to complete her analysis: O*NET *Dictionary of Occupational Titles*, Revised 2nd Edition; *Dictionary of Occupational Titles*, Revised 4th Edition; and the OASYS program. (TR. at 60; EX 2(c)).

Ms. Harvey documented that Claimant was a high school graduate. (EX 2(d)). She testified that, based upon the fact that Claimant graduated from high school as well as the forms he filled out in the Job Start program, he was able to do the work that she identified. (TR. at 83). She also assigned levels to Claimant's reasoning, mathematical, and language development skills "based on [his] work experience," and reported that these were the "highest levels" (on a scale of

[3] However, in her addendum to the labor market survey, Ms. Harvey noted that the average hourly wage was $6.80 per hour. *See* discussion *infra*, pp. 16-17.

1 to 6 with 6 being the highest) indicated by Claimant's work experience. She assigned skill level 4 to Claimant's reasoning and mathematical abilities and skill level 3 to Claimant's language development skills. (EX 2(d)).[4]

Ms. Harvey reported the results of the Wonderlic Basic Skills Test, which was administered upon Claimant and scored by GENEX on June 5, 2003. Ms. Harvey wrote that the testing indicated that Claimant "is performing at less than 6th grade level in verbal skills, 7.5 grade level in quantitative skills, and less than 6th grade level overall." (TR. at 81; EX 2(d)-2(e)). Ms. Harvey testified at the hearing that the low results from this test could indicate that Claimant did not put forth any effort on this test, considering the fact that Claimant is a high school graduate and had held his position with Employer since 1979. (TR. at 103-04). Ms. Harvey also stated that she would have expected similar results had Claimant been re-tested with the Wonderlic test "because I can't influence the motivation of somebody taking the test as to how they want to achieve it." (TR. at 104-05).

GENEX also administered and scored a Career Ability Placement Survey (CAPS), according to the labor market survey. Ms. Harvey wrote that those survey results indicated that Claimant "has measured abilities for probable success in a variety of occupations." She also wrote that Claimant's "strongest areas for success" were occupations involving: "technology, skilled (construction, manufacturing, installation or repair of products); outdoor (occupations involving activities performed primarily out of doors); consumer economics (food and textile products) and service, skilled (providing services to persons catering to the tastes, desires and welfare of others in the fields of personal service)." (EX 2(e)).

Ms. Harvey also included in the labor market survey a "Pre-Injury Vocational Profile." She wrote that, according to the OASYS program, which uses the Dictionary of Occupational Titles, The Classification of Jobs, and the U.S. Department of Labor, she was able to determine Claimant's functional abilities based upon his pre-injury work history. She did note, however, that OASYS may not be an accurate reflection of current skill levels because of the passage of time or injury. As to Claimant's "Specific Vocational Preparation," defined as "the amount of time required by a typical worker to learn the technique, acquire the information and develop the facility needed for average performance in a specific job worker situation," Claimant was classified as a 7 or "Skilled" (on a scale of 1 to 9, with 9 being the highest). Claimant's aptitudes for "Form Perception" and "Manual Dexterity" were rated at skill level 2 (on a scale of 1 to 5, with 1 being the highest). Based on Claimant's work history, Claimant was determined to have the following temperaments: "Attaining tolerances, precise limits" and "Making judgments and decisions." Finally, Claimant's work history and transferable skills analysis revealed a vocational interest in Mechanics, or "Interest in applying mechanical principals to practical

[4] The description of "Reasoning Development" consists of the following: "Apply principles of rational systems to solve practical problems and deal with a variety of concrete variables in situations where only limited standardization exists. Interpret a variety of instructions furnished in written, oral, diagrammatic, or schedule form." The description of "Mathematical Development" reads as follows: "Shop Math: practical application of fractions, percentages, ratio and proportion, mensuration, logarithms, slide rule, practical algebra, geometric construction, and essentials of trigonometry." Finally, "Language Development is described as: "Able to read a variety of novels, magazines, atlases, and encyclopedias. Read safety rules. Write reports and essays with proper format, punctuation, spelling, and grammar, using all parts of speech. Speak before an audience with poise, voice control, and confidence, using correct English and well-modulated voice." (EX 2(d)).

situations, using machines, hand tools or techniques." (EX 2(e)-2(f)). Therefore, Ms. Harvey concluded that Claimant retained the following skills and that these skills were not affected by his injury: Ability to read and follow directions; Knowledge/experience using tools, materials & methods for a trade/craft; Analyze data; Speaking-signaling people; and Precision working. (TR. at 85; EX 2(f)).

Ms. Harvey identified three areas of career alternatives for Claimant: (1) parks and recreation worker; (2) entry level customer service/cashier; and (3) driver. (TR. at 61; EX 2(g)). Ms. Harvey testified that during the Job Start program, "parks and recreation" was identified as a job category in which she searched for jobs for Claimant. The other two categories determined as career alternatives were not pursued in the Job Start program and were different "based on the injuries that he had and the scoring that he did in the career ability placement survey, the availability of jobs in the time frame that I was doing the labor market survey." (TR. at 61). Ms. Harvey wrote in the survey that Claimant "demonstrated appropriate knowledge, skills, and abilities through his previous education and vocational training" and was a "competitive candidate" for these positions. The survey indicated that she contacted employers in Hampton, Newport News, Norfolk, Virginia Beach, and Chesapeake, Virginia, and northeast North Carolina on September 24 and 25. (EX 2(g)). Ms. Harvey indicated during her testimony at the hearing that all of the jobs that she identified were hiring in the May through August, 2003, timeframe and were still hiring at the time Ms. Harvey completed her addendum to the survey in February, 2004. (TR. at 66).

By letter dated September 30, 2003, Ms. Harvey wrote to Dr. Skidmore, requesting that he review the eight positions that she identified and indicate in a reply whether he approved or disapproved of these positions for Claimant. (EX 4(a)). Ms. Harvey testified that she contacted Dr. Skidmore's office several times both after the initial labor market survey and after she completed her addendum to have him review the job analyses, but to date, he had not responded to her inquiry. (TR. at 87-88).

On February 2, 2004, Ms. Harvey submitted to Employer's counsel an addendum to her original labor market survey. She wrote that she had visited each of the employers to review the information she previously obtained for each of the jobs for its accuracy. (EX 3(a)). After conducting her addendum survey, Ms. Harvey maintained that all of the positions named in the original survey remained within Claimant's physical restrictions and his educational and skill areas. Finally, she concluded that the average hourly wage changed to $6.80 per hour. (EX 3(b)).

At the court's instruction, Ms. Harvey provided additional calculations as to the average hourly wage based upon the addendum to the labor market survey. Ms. Harvey indicated following the hearing that, based upon her February 2, 2004, addendum to the labor market survey, Claimant's potential wage of $10.10 per hour had not changed, but that his average hourly wage had changed to $6.80 per hour. Ms. Harvey also noted that "due to the fluctuation in the number of hours available in all 8 positions, Mr. Williams's average weekly wage ranges from $217.60 to $261.80 per week." She determined the average weekly wage by averaging the minimal number of hours offered by all 8 employers and multiplying that by the $6.80 average hourly wage, and that she conducted the same process for the maximum number of hours offered

by the employers. She then averaged the two weekly rates and determined a final average weekly wage earning capacity of $239.75. (EX 8). Additionally, she noted that if the two Driver positions were eliminated due to a sitting restriction, the average weekly wage would increase in range to between $223.36 and $272.22 weekly, for a final average weekly wage of $247.79. (EX 8).

1. Customer Service Representative/Cashier

These positions require interaction with customers and responding to inquiries about products and services as well as resolution of complaints. The individual would also be required to receive and disburse money, use electronic scanners and cash registers, process credit card transactions, and validate checks. Ms. Harvey identified five prospective employers in this category. (EX 2(g)).

A. Norfolk Airport Authority, Norfolk, Virginia, *Parking Cashier*—This position paid $10.10 per hour and was a 40-hour per week job. Parking cashiers were hired in May and August, 2003. (EX 2(g), 2(k)). This particular position required collection of parking fees, preparation of an accurate shift report, and deposit of the total collection into a safe for police pick-up. The cashier is expected to assist patrons promptly and courteously; maintain accurate daily revenue totals; timely and accurately complete a nightly license plate inventory; and clean the booth at the end of the shift by sweeping and emptying the trash. This employer would allow the worker to sit or stand as needed. Physically, the worker would have to enter and exit the booth via a ten-inch step, and possibly drive a vehicle to complete the license plate inventory. The worker would be expected to walk no more than one hour per day. (EX 2(k)). No other physical capabilities were noted.

In her addendum, Ms. Harvey indicated that the job description remained accurate, except that the salary had increased. (EX 3(a)). When she testified at the hearing, Ms. Harvey opined that Claimant had the mathematical ability to perform this job and opined that he was good at "simple mathematics" such as addition and subtraction. (TR. at 64, 98). She also testified that Claimant had the skills to complete the shift reports, even though she had not seen a copy of what the report required, based upon the paperwork he filled out at the Job Start program. (TR. at 91). Ms. Harvey stated that she did not feel that the restriction on pushing and pulling would prevent Claimant from engaging in an activity such as sweeping. (TR. at 115).

B. Central Parking Systems, Norfolk, Virginia, *Cashier, Attendant*—This position paid $6.00 per hour for a 40-hour work week. A cashier was hired in August, 2003. (EX 2(h), 2(*l*)). This particular position required receiving cash from customers; making change; issuing receipts or tickets; operating a ticket-dispensing machine; and riding a cart or scooter within parking lot. The employer would provide training and did not require a high school diploma. Physically, the position would require lifting less than five to ten pounds. (EX 2(*l*)).

This job description was revised in her addendum. Ms. Harvey noted that the salary was now $5.75 per hour; and a high school diploma or GED was required. (EX 3(a)). Also, the requirement that the individual ride a cart or scooter was removed, and the weekly hours were adjusted to 24-36 per week. (EX 3(i)).

C. City of Chesapeake, Chesapeake, Virginia, *Toll Collector*—This position paid $8.50 per hour for a 40-hour work week. Toll collectors were hired in May and July, 2003. (EX 2(h), 2(m)). Particularly, this position would require receiving and accounting of money; assessing and recording the appropriate toll; and maintaining a clean toll house. This job required an individual to understand the basic concepts of toll collection; general knowledge of cashier duties; ability to do simple math and count money with speed and accuracy; ability to provide courteous service; and some clerical experience, including the handling of money. The employer notes that graduation from high school or the equivalent was required as well. Physically, the job would require occasional stooping, occasional walking, and lifting less than ten pounds. (EX 2(m)).

Ms. Harvey included an official city job description in her addendum. The physical requirements state: "requires sedentary work that involves walking and standing some of the time, exerting up to 10 pounds of force on a recurring basis." (EX 3(a), 3(*l*)). The "essential tasks" section of the city job description also includes the duty of sweeping the floor and taking out trash. (EX 3(j)). The revised job analysis notes that the salary was $8.33 per hour at that point. (EX 3(m)). Ms. Harvey testified at the hearing that she believed Claimant had the ability to perform the basic clerical work that would accompany this job. (TR. at 101-02). She later testified, however, that Claimant has never used a cash register nor had any understanding of the concept of basic toll collection to her knowledge. (TR. at 105).

D. Race Coast, Chesapeake, Virginia, *Cashier*—This position paid $6.00 per hour for a 40-hour work week. The survey indicated that a cashier was hired in June, 2003, and that this business "hires often." (EX 2(h), 2(n)). The job duties of this position were: operating a cash register to total customer purchases; collecting cash, check, or charge payments; stocking shelves as necessary; counting money at start and end of shift; bagging merchandise; and using an electronic scanner. Physically, this job would require the following activities, all for approximately one hour per day: reaching above shoulder height; working with body bent at waist; climbing incline stairs/ladders; working with arms extended at shoulder level; and stooping. (EX 2(n)).

Ms. Harvey indicated that "updates" were made to the job description in the addendum. (EX 3(a)). The updated job analysis notes that this position was for 27-40 hours per week, and that the salary of $6.00 was for an individual without experience. Additional duties noted were: stocking the cooler and cleaning the store, which consisted of sweeping and mopping the bathroom floors; taking out the trash; and sweeping the parking lot. The individual would also have to stand for 5-7 hours, depending upon the shift, and walk up to one hour around the store and parking lot. (EX 3(o)).

E. Checkered Flag, Virginia Beach, Virginia, *Counter Person*—This position paid $6.50 per hour for a 40-hour week, and a counter person was hired in June, 2003. (EX 2(h), 2(o)). This position would require assisting customers with auto parts questions; obtaining auto parts as necessary; using a computer to retrieve parts information; and quoting prices over a telephone. Physically this job would require the following activities, all for approximately one hour per day: reaching above shoulder height; climbing incline ladders/stairs; sitting; walking;

pushing/pulling; and stooping. It would also require the individual to stand six hours per day and to lift up to twenty pounds. The employer would accommodate the individual for lifting heavier items. (EX 2(o)).

Ms. Harvey indicated that the job description was reviewed with an employer representative, and no changes were made. (EX 3(a)). The job analysis in the addendum notes that breaks could be taken "as needed." (EX 3(p)). During the hearing, Ms. Harvey testified that this position was located outside of the initial geographic area in which she looked for jobs for Claimant when he was part of the Job Start program. She testified that she initially identified Suffolk, Portsmouth, Isle of Wight, Chesapeake, Norfolk, and Newport News, Virginia, as the geographic area in which she would search for jobs. However, she located this and other positions in Virginia Beach, Virginia, after identifying Virginia Beach as "another option." (TR. at 78).

2. Parks & Recreation Worker (Receptionist & Information Clerks)

These positions require an individual to answer inquiries and obtain information for the general public. The survey identified one prospective employer in this category. The City of Hampton, Virginia, sought a Park Attendant at a wage rate of $5.22 per hour for a 40-hour work week. Park attendants were hired in June and July, 2003, and the survey notes that there were "multiple openings throughout year. (EX 2(h)-2(i), 2(p)). This particular position would require patrolling and monitoring parks to ensure compliance with park rules; assisting visitors and answering questions; collecting fees; writing receipts; maintaining records; monitoring cleanliness of parks; picking up litter; mowing grass; reporting damages; cleaning restroom facilities; and operating a two-way radio. The individual would be required to pass a controlled substances test and possess a valid driver's license. Physically, the individual would be required to occasionally bend at the waist and stoop; to push/pull one hour per day; to sit for two hours per day; to stand and walk for three hours per day each; and to lift ten pounds. (EX 2(p)).

When conducting her addendum survey, Ms. Harvey noted that the job description was reviewed with a human resources assistant, who stated that if an applicant requested accommodations and a copy of the physical restrictions were provided, "every effort would be made to make the accommodations, if reasonable" and that accommodations had been made for other city positions. Ms. Harvey attached the city job description to the addendum. (EX 3(a)). As to the physical requirements of this job, Ms. Harvey confirmed that she was not aware of how much the lawn mower weighed that was used to mow grass at the Hampton parks. (TR. at 109).

3. Driver (Courier)

These positions require an individual to pick up and carry messages, documents, or packages between locations, and traveling by foot, automobile, or other means. Ms. Harvey identified two prospective employers in this category. (EX 2(i)).

A. Enterprise Rental Cars, Virginia Beach, Virginia, *Driver*—This position paid $6.50 per hour for a 40-hour work week and was hired for in June, 2003. The survey notes that this employer "hires often." (EX 2(i)). The position would require picking up and delivering

automobiles to customers and to the service area. This position required the individual to have a flexible schedule and a good driving record as well. The employer was hiring at the Newport News and Norfolk, Virginia, locations. Physically, the position would require the person to occasionally work with the body bent at the waist; stand and walk occasionally; to sit for four hours; and to lift ten pounds. The individual could take breaks "as needed." (EX 2(q)).

When conducting her addendum survey, Ms. Harvey wrote that she met with the Recruiting Manager, who reviewed the job description, and "updates" were made. Most significantly, it was noted that more than one flight of stairs may be required to be ascended/descended at times. Also, if a customer had luggage, the individual would have to use their own judgment as to how much assistance to give, "but customer service is a priority." However, the manager stated that he did not expect someone with a lifting restriction to lift beyond their capacity. (EX 3(b), 3(s)).

B. Budget Rent A Car, Norfolk, Virginia, *Driver*—This position also paid $6.50 per hour for a 40-hour work week and was hired for in July, 2003. The survey notes that this employer also "hires often." (EX 2(i)). This position required picking up and returning cars between the airport and the service area, as well as shuttling customers. The position was located at the Norfolk terminal and also required a "good DMV report." Physically, the worker would be required to kneel or crawl less than one hour; stand for one hour; walk for two hours; sit for four hours; and lift ten pounds occasionally. (EX 2(r)).

In her addendum survey, Ms. Harvey noted that the hourly wage for this position had changed to $6.00 per hour and that the hours were not necessarily full time, but could range from 25-32 hours maximum per week. (EX 3(b), 3(t)). It was also noted in the revised job analysis that the individual would be required to drive between Norfolk, Newport News, and Virginia Beach, Virginia. The standing requirement was modified from one hour to two hours. (EX 3(t)).

Analysis

Employer argues that the labor market survey clearly shows that there were eight entry-level positions available in the local labor market during the survey's time frame and that these positions were appropriate to Claimant given the work restrictions set forth by Dr. Skidmore on April 17, 2003. Employer also argues that Ms. Harvey reviewed the work restrictions issued by Dr. Foer in February, 2004, and that the jobs were still appropriate given those restrictions. Her only caveat was that Dr. Foer had not quantified the sitting restriction, which could impact the appropriateness of the Enterprise Rental Car and Budget Rent-A-Car driver positions. (Employer's Brief, at 15). Employer also maintains that these positions are appropriate and constitute suitable alternate employment because Ms. Harvey also took into account her interaction with Claimant during the Job Start program; his test results, which she interpreted; and his work experience. (Employer's Brief, at 16).

In support of its argument, Employer asserts that Claimant retains "significant vocational abilities" and cites to Claimant's testimony that he has returned to work for Employer as an instructor. Employer also highlights Claimant's admitted skills of reviewing diagrams, taking measurements, performing math calculations, and cutting and assembling pipe. (Employer's

Brief, at 16). Finally, Employer cites to the fact that Claimant is a high school graduate with 23 years experience at the shipyard. (Employer's Brief, at 16-17). Employer also asserts that the restrictions imposed by Dr. Foer were almost identical to those set forth by Dr. Skidmore, with the exception of Dr. Foer's unquantified sitting restriction, and the fact that Dr. Foer did not include a restriction on the use of vibratory tools. To this extent, Employer maintains that nothing in Claimant's testimony indicated that sitting caused an increase in his pain. (Employer's Brief, at 18).

Claimant argues in his post-hearing brief that the labor market survey submitted by Employer is insufficient and fails to establish suitable alternate employment. Claimant argues that the position at Checkered Flag as a counter person does not constitute suitable alternate employment because it falls outside of Claimant's restrictions, citing to Ms. Harvey's testimony that this job would require lifting more than twenty pounds. Claimant also refers to Ms. Harvey's testimony that she relied on this job because the employer expressed a willingness to accommodate Claimant's restrictions. Claimant also argues that this job is not suitable because it requires that an individual be capable of being trained to use a computer. According to Claimant, Ms. Harvey never asked Claimant whether he could use a computer, and she testified that she had not trained Claimant in the use of computers. To this extent, Claimant argues that this position is outside of his educational capabilities, given that he tested at the sixth grade level. (Claimant's Brief, at 11-12).

Next, Claimant argues that Ms. Harvey never demonstrated that Claimant possesses the skills or has the ability to count money, complete paperwork, or process receipts and credit cards as would be required for the position at Race Coast. Further, Claimant argues that, assuming his test scores were accurate, this position would also fall outside of Claimant's educational abilities. (Claimant's Brief, at 12). As to the parking attendant position with the Norfolk Airport Authority, Claimant cites to Ms. Harvey's own testimony that Claimant does not possess the skills to perform this job. (Claimant's Brief, at 12). Claimant argues that the cashier/attendant position with Central Parking Systems is not suitable for him because the position requires clerical experience, of which Claimant has none. Like the position with Norfolk Airport Authority, Claimant cites to Ms. Harvey's testimony that Claimant does not have the requisite math or transactional skills or knowledge of using a cash register or a computer to perform this job. (Claimant's Brief, at 13).

Claimant asserts that the driver positions with Enterprise Rental Car and Budget Rent-A-Car are not within Claimant's physical restrictions. Claimant points to Ms. Harvey's statement that, after she reviewed the restrictions set forth by Dr. Foer, she would also agree that the driver positions were not appropriate for Claimant, and the labor market survey was amended to exclude these positions. (Claimant's Brief, at 13).

As to the toll collector position with the city of Chesapeake, Virginia, Claimant argues that Ms. Harvey presented no evidence to demonstrate that Claimant is capable of performing this job, which would require completing paperwork as to money amounts and receipts. Again, Claimant stresses that his test scores would indicate that he is not capable of performing this job. (Claimant's Brief, at 13-14). Finally, as to the position of park attendant for the city of Hampton, Virginia, Claimant argues that the job duties of cleaning restroom facilities, emptying

trash, picking up littler, sweeping, and mowing grass are all beyond his physical restrictions, particularly, the restriction imposed by both Drs. Skidmore and Foer limiting Claimant to lifting no more than twenty pounds. Claimant points to Ms. Harvey's lack of knowledge as to how much the lawn mower would weigh as well as her testimony that she would rely on the employer to make an accommodation as to Claimant's lifting restriction. Further, Claimant maintains that he does not have the knowledge to keep accounts and records as required by the job and that Ms. Harvey did not know whether Claimant had that ability. Finally, Claimant points out that, in his depressed state of mind, it was questionable whether he could perform his job duties and interact with the public in a courteous manner. (Claimant's Brief, at 14).

As to all of the jobs, Claimant argues that they are outside the 35-mile radius from his home and would require that he travel more than one hour for employment, thereby disqualifying these jobs as being within close proximity to his residence. (Claimant's Brief, at 14-15 (citing *Kilsby v. Diamond Drilling Co.*, 6 BRBS 114 (1977))). Claimant also points out that when working for Employer, Claimant was making a much higher wage than anticipated by the jobs in the labor market survey (approximately $17.00 per hour), and traveled back and forth to work by vane or bus with other shipyard workers, thereby incurring much lower transportation costs than the jobs within the labor market survey would require. (Claimant's Brief, at 15).

Claimant additionally asserts that Ms. Harvey improperly relied on part-time employment as suitable alternate employment. (Claimant's Brief, at 16 (citing *Carter v. Gen. Elevator Co.*, 14 BRBS 90, 97 (1981); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 734, 740 (1976))). Claimant highlights that, while the jobs identified in the initial labor market survey purported to be based upon a 40-hour work week, many of the jobs were in fact part-time positions, including the jobs at Central Parking System, Race Coast, and Budget Rental Car. (Claimant's Brief, at 16-17).

Claimant also takes issue with Ms. Harvey's testimony that some of the jobs identified in the survey would require the employer to make accommodations based upon Claimant's work restrictions. Claimant argues that "beneficient employment," that employment which includes arranging job locations to meet an employee's physical restrictions or treating an employee with "kid gloves," does not establish suitable alternate employment. (Claimant's Brief, at 17 (citing *Lumber Mut. Cas. Ins. Co. v. O'Keefe*, 217 F.2d 720, 723 (2d Cir. 1954); *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F.2d 513 (9th Cir. 1939); *Patterson v. Savannah Shipyard & Mach.*, 15 BRBS 38, 42 (1982))). Claimant asserts that based on Ms. Harvey's admittance that the jobs would require some form of accommodation, those jobs requiring the accommodations should be excluded from consideration. (Claimant's Brief, at 17).

By letter dated May 26, 2004, Claimant responded to Employer's Exhibit 8, which was submitted post-hearing. Claimant stated that, while he was not abandoning his argument that he is entitled to temporary total disability for the time periods claimed, he would stipulate to a wage-earning capacity of $239.75 per week if it was found that Claimant was entitled only to temporary partial disability.

Overall, I find that the labor market survey supports the conclusion that the jobs identified were available during the period of claimed disability, as all of the positions either

were hiring or actually hired individuals during the labor market survey period. It is also to be noted that Dr. Skidmore never approved any of the identified jobs, despite what appears to be a diligent effort by Ms. Harvey to obtain Dr. Skidmore's opinion on that issue. To that extent, however, the record contains no evidence that Ms. Harvey requested Dr. Foer to review the positions and give his opinion as to whether they were appropriate, even though she reviewed his restrictions as well.

In addition, the evidence supports the conclusion that all of the jobs identified in the labor market survey are within Claimant's geographic area. Claimant resides in Suffolk, Virginia, which is centrally located in relation to the locations of the employers identified in the labor market survey. Further, I find that the job opportunities are located in the "relevant labor market," as required by the Fourth Circuit. *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380-81 (4th Cir. 1994). Ms. Harvey testified at the hearing that when she initially consulted with Claimant for the Job Start program, she noted the fact that Claimant resided in Suffolk, an area that, on its own, would not serve as a sufficient labor market. Ms. Harvey testified that she included other areas, including Norfolk and Chesapeake, Virginia, when searching for jobs for Claimant while he was in the Job Start program. When she conducted the labor market survey, Ms. Harvey stated that she expanded her search to Virginia Beach, Virginia, as "another option." (TR. at 77-78). The case cited by Claimant, *Kilsby v. Diamond Drilling Co.*, 6 BRBS 114 (1977), does not support his argument on this issue. In *Kilsby*, the BRB affirmed the decision and order of the administrative law judge, who found that the positions identified by the employer were located anywhere from 65 to 200 miles from the injured employee's residence, and thus fell outside of his geographic area. *Id*. at 119-20. None of the positions identified by Employer come even close to being located 65 miles from Claimant's residence. Rather, I find that the identified employers are all located within a reasonable distance from Claimant's residence. Therefore, I find that the jobs are located within Claimant's geographic area.

As to the positions with Norfolk Airport Authority and Central Parking Systems, it appears that Claimant is physically capable of performing both of these jobs. The physical requirements of either job are minimal and do not go beyond the restrictions set forth by either Dr. Skidmore or Dr. Foer. Further, there is no indication that any accommodations would need to be made for Claimant to perform either of these jobs. This leaves for determination whether Claimant possesses the skills to perform the jobs, considering his education, work experience, and transferable skills. Looking at the overall skill assessment and his testing results, I find that Claimant does possess the requisite skills to perform either of these jobs. Even though Claimant scored low on one of the administered tests (the Wonderlic test), I find it more compelling that Claimant has successfully held his position with Employer for over 23 years. By virtue of this fact, he demonstrates the ability to be trained, learn a skill, and perform that skill on a regular and repeated basis. Ms. Harvey also credibly testified that Claimant is good at "simple mathematics" like addition and subtraction. Therefore, I find that, considering Claimant's age, experience, and physical restrictions, these positions constitute suitable alternate employment.

The position of toll collector for the city of Chesapeake, Virginia, is not dissimilar from the two cashier/parking attendant positions discussed above. Even though Ms. Harvey testified that, to the best of her knowledge, Claimant had never used a cash register or computer, she also

testified that Claimant had the ability to perform the requisite basic clerical work. I, too, find that Claimant possesses the ability to perform basic clerical work, based upon his previous work experience and demonstrated abilities. Again, I do not find that this job has physical requirements that go beyond the stated restrictions nor that accommodations would need to be made for Claimant. Therefore, I find that, considering Claimant's age, experience, and physical restrictions, this position also constitutes suitable alternate employment.

I find that the position of cashier at Race Coast in Chesapeake, Virginia, does not constitute suitable alternate employment. The physical demands of this job appear to exceed Claimant's physical capabilities. One of Claimant's physical restrictions is that he is not to perform overhead work. However, the physical requirements of this job state that the individual would be required to reach above shoulder height, which I interpret as requiring at least some overhead work. This is the not the only physical restriction that this job violates. Claimant is to lift and carry only up to 20 pounds. The job description and labor market survey fail to clearly state that the listed job duties of taking out trash, sweeping both the bathrooms and the parking lot, and mopping would require that Claimant lift and/or carry less than 20 pounds. There is no indication that the potential employer would make any accommodations for Claimant if a mop bucket weighed over 20 pounds (including the water) or if a bag of trash exceeded that weight. It is also conceivable that stocking shelves with merchandise could also exceed the lifting and carrying restriction if Claimant were required to carry large boxes of merchandise to the sales floor for stocking purposes. This position is also questionable under the physical restrictions set forth by Dr. Foer, who noted that Claimant should engage in only limited pushing and pulling. Requiring Claimant to sweep and mop a large area like a parking lot or store floor on a regular basis would violate this restriction in my opinion and again, there is no indication that an accommodation would be made for him. Therefore, I find that this position does not constitute suitable alternate employment.

I also find that the position of counter person at Checkered Flag in Virginia Beach, Virginia, does not constitute suitable alternate employment. This position also requires reaching above shoulder height, which, as stated, I interpret as requiring at least some overhead work. Also, there is no indication that Claimant has any experience in the automotive parts industry, which calls into question his ability to assist customers with their questions about auto parts as stated in the job requirements. Therefore, I find that this position does not constitute suitable alternate employment.

As to the position of park attendant for the city of Hampton, Virginia, I find that this position also does not constitute suitable alternate employment. This position exceeds Claimant's physical restrictions. In particular, the requirements that the park attendant mow grass and clean restroom facilities fail to clearly state whether these duties would require Claimant to lift and/or carry in excess of 20 pounds. When asked how much the lawn mower weighed, Ms. Harvey replied that she did not know. When Ms. Harvey completed the addendum to the labor market survey, she was told that "every effort would be made to make the accommodations, *if reasonable*." (EX 3(a) (emphasis added)). Ms. Harvey also noted that she was told that accommodations had been made in the past for other city positions. It does not suffice that accommodations will be made "if reasonable." A position cannot be deemed suitable alternate employment based upon the *possibility* that an employer *may* make accommodations if

that employer deems the accommodations reasonable. Therefore, I find that this position does not constitute suitable alternate employment.

The two driver positions, for Enterprise Rental Car and Budget Rent-A-Car will be examined together as both the skill and physical requirements of the jobs are similar, except that for the position with Enterprise Rental Car, the worker would need to "use their own judgment" as to how much assistance to give to customers with luggage. The manager stated simultaneously that, while he did not expect someone to lift beyond their capacity, "customer service is a priority." Claimant has raised the issue that these positions are not appropriate for Claimant given the sitting restriction issued by Dr. Foer. However, Employer argues that nothing in Claimant's testimony indicated that sitting made his problems worse and that Dr. Foer's sitting restriction is unquantified; therefore, these positions should be deemed appropriate for Claimant.

First, as to the position with Enterprise Rental Car, I find that this position would not constitute suitable alternate employment. The manager interviewed by Ms. Harvey is notably ambivalent with regard to whether accommodations would be made and whether employee safety or customer service would take a priority with the identified position. Therefore, I find that the physical requirements of this position exceed Claimant's physical restrictions.

Based upon the medical evidence, I find that Dr. Foer's restriction on sitting is reasonable, considering the problems detected in Claimant's spine at C3-4 and at C6-7 noted by both Drs. Foer and Skidmore. While Claimant may not be currently experiencing problems from sitting for extended periods of time, it is certainly possible that jobs that would require sitting for any length of time could cause additional harm to Claimant. Therefore, I find that Dr. Foer's sitting restriction is proper. In consideration of that finding, I further find that the position with Budget Rent-A-Car does not constitute suitable alternate employment because the position would require Claimant to exceed his physical restrictions. I am mindful that Dr. Foer did not quantify the sitting restriction. However, a reasonable reading of this restriction dictates that sitting for four hours would not constitute "limited sitting."

In summary, I find that Employer has met its burden of proving that the following three positions constitute suitable alternate employment: (1) parking cashier with Norfolk Airport Authority; (2) cashier/attendant with Central Parking Systems; and (3) toll collector with the city of Chesapeake, Virginia. Further, these positions represent a range of available jobs for which Claimant could realistically compete. The positions of cashier at Race Coast, counter person at Checkered Flag, park attendant with the city of Hampton, Virginia, and the driver positions at Enterprise Rental Car and Budget Rent-A-Car do not constitute suitable alternate employment because the positions do not comport with Claimant's physical restrictions. The position of counter person at Checkered Flag also does not constitute suitable alternate employment because it exceeds the skills possessed or able to be possessed by Claimant.

Because Employer has satisfied its burden of establishing the existence of suitable alternate employment, I will next consider whether the evidence demonstrates that Claimant diligently sought employment.

Diligent Employment Search

Once an employer meets its burden of showing that suitable alternate employment is available to a claimant if that claimant diligently seeks it, the claimant bears a complementary burden and "may still establish disability by showing that he has diligently sought appropriate employment but has been unable to secure it." *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988) (citing *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 200 (4th Cir. 1984)); *see also New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043 (5th Cir. 1981). Further, the claimant need not seek jobs identical to those identified by the employer as suitable alternate employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2d Cir. 1991). The employment need only be "within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *Trans-State Dredging*, 731 F.2d at 202. However, the jobs that a claimant seeks must be "appropriate" and consistent with the claimant's physical restrictions. *See Tann*, 841 F.2d at 543-44 (finding that claimant's work as a farmhand was not appropriate work given that claimant was physically restricted from doing extensive lifting, climbing, walking, and standing). Further, if a claimant "offers evidence that he diligently tried to find a suitable job, . . . the ALJ should make specific findings regarding the nature and sufficiency of claimant's alleged efforts." *Palombo*, 937 F.2d at 75. The likelihood of a finding that the claimant diligently sought employment is reduced where the claimant fails to seek employment for a significant period of time. *Tann*, 841 F.2d at 544. The claimant also bears the burden of showing that he is willing to work. *Trans-State Dredging*, 731 F.2d at 201. The Board has previously held that injured claimants must cooperate with vocational consultants, and failure to do so may contribute to a finding of lack of willingness to work. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, 102 (1985).

If a claimant proves that he diligently sought employment, the finding of total disability may be reinstated. *Palombo*, 937 F.2d at 75; *Tann*, 841 F.2d at 542. If a claimant does not meet his burden of proof as to whether he diligently sought employment, the claimant will be considered only partially disabled and will be limited to the recovery that is provided for in the applicable schedule under Section 8 of the Act. 33 U.S.C. §908(c) (2002); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 274 (1980); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 918 (4th Cir. 1998).

Claimant testified that he was told he needed to participate in the Job Start program in June, 2003. (TR. at 28). He did not state who told him that he needed to participate in the program. Claimant testified that he reported to the Job Start program as instructed and that during the second week of the program, he was given job search assignments. After receiving the assignments, he would go to the businesses on his list and apply for the positions. (TR. at 30). On or about June 24, 2003, Claimant contacted Rebecca Seaford to inform her that he would no longer attend the program because he was "depressed and hurting," and he "just couldn't do it anymore." (TR. at 35-37). Claimant affirmatively testified that the only jobs he looked for were those referred to him by the Job Start program. He stated that he did not look for any other jobs either before or after his participation in the program. (EX 1(h)-(j)).

Claimant argues that he was justified in not completing the Job Start program and that his efforts to participate in the program demonstrate his diligence to find employment. Claimant argues that he put forth great effort to participate in the program by driving around to the various businesses, spending time and gas money to do so without any assistance from Employer. Claimant takes issue with the fact that he was sent to apply for jobs at several businesses that were not open when he arrived and argues that he was asked to drive more than an hour away from his home. Claimant also argues that "The constant run around dragged Ms. Williams down and caused him to become quite depressed." Claimant asserts that his condition was made worse by the fact that Employer completely terminated his compensation benefits in an arbitrary fashion, even though he did "everything within his power to comply with the shipyard's Job Club program." (Claimant's Brief, at 9-10).

Employer does not dispute that Claimant did not seek work between May 1, 2003, and June 2, 2003, and from June 27, 2003, until August 5, 2003. (Employer's Brief, at 14). Further, Employer argues that Claimant "can offer no explanation for why he did not seek work during the two closed period of time in question." Therefore, Employer requests that Claimant's request for temporary total disability benefits be denied and that Claimant be awarded only benefits for temporary partial disability during the time frame in question. (Employer's Brief, at 19).

To sustain his burden of proof that he diligently sought employment, Claimant must establish that he sought alternate employment that is appropriate and consistent with his physical restrictions. He must also establish that he is willing to work. Claimant's task of meeting his burden of proof is hampered by the fact that the only attempts that he made to find work were through the Job Start program. To be sure, while participating in the Job Start program, Claimant visited at least a portion of the businesses to which he was sent and registered for job search assistance at the Virginia Employment Commission. (CX 4). The fact that Claimant did not complete the Job Start program does not weigh heavily toward a finding that Claimant did not diligently seek employment. Ms. Harvey admitted that the program length was only 20 business days. (TR. at 59, 71) According to the evidence, Claimant attended the program from June 4, 2003, until at least June 23 or 24, 2003, a period of 14 or 15 days, prior to contacting Ms. Seaford to state that he would not be returning. (CX 4; EX 6). The medical reports indicate that Claimant did experience a problem with depression, moods, and sleeping; however, there is no mention of this condition in the medical reports until February 17, 2004. (CX 10). While Claimant did participate in Job Start for approximately 2/3 of the program's length, that does not erase the fact that Claimant only sought work through this program and never on his own accord. Such action cannot be deemed a diligent employment search. Further, while the court is mindful of the fact that Claimant apparently did suffer from depression to at least some degree at some point in time, he did not assert suffering from depression prior to June 24, 2003, thereby providing no reason whatsoever as to why he did not seek employment at least in the period prior to his participation in the Job Start program.

Claimant also has failed to demonstrate a willingness to work. While Claimant did testify that he felt like he could have worked in the shipyard between May, 2003, and September, 2003, doing the job that he is currently performing, this statement does not rise to the level necessary to allow me to find that Claimant demonstrated a willingness to work.

Therefore, based upon the evidence, I find that Claimant failed to diligently seek employment nor did Claimant establish that he was willing to work. As a result, Claimant's claim for temporary total disability from May 1, 2003, through June 2, 2003, inclusive, and from June 27, 2003, through August 5, 2003, inclusive, must be denied, and Claimant therefore is considered only partially disabled. Because Employer previously paid Claimant temporary total disability benefits for May 1, 2003, through June 2, 2003, inclusive,[5] I find that these payments were improperly paid, and Employer therefore will be entitled to credit for such payments.

Date of Availability of Suitable Alternate Employment

Total disability becomes partial on the date that Employer establishes suitable alternate employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 130-31 (1991) (citing *Director, OWCP v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1990)). As stated above, Employer has established that suitable alternate employment was available to Claimant. In the labor market survey, the job of parking cashier with Norfolk Parking Authority was noted as being available in May, 2003, and subsequently in August, 2003. (EX 2(g), 2(k)). The position of cashier/attendant with Central Parking Systems was available in August, 2003. (EX 2(*l*)). Finally, the position of toll collector with the city of Chesapeake, Virginia, was available in May, 2003, and again in July, 2003. (EX 2(h)). The time frame of the labor market survey was May 1, 2003, through August 6, 2003. (EX 2). On April 17, 2003, Claimant was told by Dr. Skidmore that he could return to work with certain physical restrictions, which were the same physical restrictions utilized in the labor market survey. (CX 1-3). When Claimant took the restrictions to Employer, he was told that there was no work available within his restrictions at the shipyard. (TR. at 23).

Upon consideration of the evidence, I find that suitable alternate employment was available to Claimant at least as of May 1, 2003, and remained available through the two closed periods of disability claimed. Thus, Claimant's wage-earning capacity must now be determined.

Wage-Earning Capacity

Pursuant to Section 8(e) of the Act,

> In the case of temporary partial disability resulting in decrease in earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of the disability, but shall not be paid for a period exceeding five years.

Section 8(h) of the Act provides that an injured employee's wage-earning capacity after injury under Section 8(e) shall be determined after consideration is given to "the nature of his injury, the degree of physical impairment, his usual employment, and any other factors of

[5] As set forth in the form LS-208 submitted into evidence, Claimant was paid temporary total disability benefits for the period of May 1, 2003, through June 2, 2003. (*See* CX 7).

circumstances in the case which may affect his capacity to earn wages in his disabled condition." 33 U.S.C. §908(h). Where the claimant seeks benefits for total disability and the employer establishes suitable alternate employment, the earnings established for the alternate employment show the claimant's wage-earning capacity. *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 234 (1984).

Ms. Harvey's labor market survey and subsequent addendum established that Claimant had a wage-earning capacity of $6.80 per hour for full-time work. (EX 8). She also offered that Claimant had a weekly wage earning capacity between $217.60 and $272.22, dependent upon whether the two driver positions were eliminated due to a sitting restriction. If the two driver positions remained part of the calculation, Employer offered Ms. Harvey's statement that Claimant had an average weekly wage-earning capacity of $239.75 per week. If the driver position were removed, Claimant had an average weekly wage-earning capacity of $247.79 per week. (EX 8).

Claimant stated in his post-hearing brief that if the court determined that he was entitled to temporary partial disability benefits, the proper wage earning capacity should be determined to be $6.36 per hour, or $254.40 per week. (Claimant's Brief, at 19-20). However, after having the opportunity to review Ms. Harvey's post-hearing calculations regarding his wage-earning capacity, Claimant filed a responsive letter (per the instructions of the undersigned during a conference call held on May 20, 2004) stating that if the court found that he was entitled only to temporary partial disability, Claimant would stipulate to a wage-earning capacity of $239.75, as referenced in Ms. Harvey's calculations.

Based upon the calculations offered by Employer as well as the stipulation proclaimed by Claimant, I find that Claimant had a wage-earning capacity of $239.75 per week. The parties stipulated that Claimant's average weekly wage at the time of his injury was $627.97. (JX 1). Therefore, Claimant's weekly loss of wages is equal to $388.22, and Claimant is entitled to compensation in the amount of $258.81 per week for the time periods of May 1, 2003, through June 2, 2003, inclusive, and from June 27, 2003, through August 5, 2003, inclusive.

Mileage Reimbursement

The final issue to be addressed is whether the undersigned Administrative Law Judge has the authority to decide whether Claimant is entitled to reimbursement for mileage incurred in seeking alternate employment. If it is determined that the undersigned has such authority, it will then be determined whether Claimant in the instant matter is entitled to such reimbursement and in what amount.

During the hearing, the issue of whether the undersigned had the authority to determine whether Claimant was entitled to mileage reimbursement was raised. Counsel for Claimant argued that while he understood that the issue of reimbursement for mileage was normally an issue that was determined by the District Director, if the ALJ had authority to issue an order at this level, he would request that the court do so. Counsel for Employer argued at the hearing that he had no notice that the issue of mileage reimbursement was an issue prior to the hearing. Employer was permitted to cross-examine Claimant on this issue and to submit additional

evidence post-hearing if it so chose, and both parties were asked to address the issue in their respective post-hearing briefs. (TR. at 33-35).

Claimant argues in his post-hearing brief that he participated in the Job Start program and sought work far from his home under the impression that he would be reimbursed for the mileage he incurred, and that he was placed under this impression by the Job Start program's case workers. Claimant states that he recorded his mileage as instructed but was never reimbursed. Claimant argues that the failure of Employer to reimburse him caused added stress because he "was already pressed for income due to his work related problems." Claimant cites to Ms. Harvey's testimony that she received the mileage forms from Employer and made them available to shipyard employees who were seeking work. Therefore, Claimant asserts that "as the shipyard has thus given Ms. Harvey permission to submit these forms to claimants, the shipyard should further be responsible for any mileage/transportation associated with the Job Club/Start program." Finally, Claimant argues that "This is especially significant since Job Club is directed by the shipyard and a claimant's refusal to participate affects his entitlement to workers' compensation benefits. This factor alone demonstrates the compensability of [Claimant's] mileage by the shipyard." (Claimant's Brief, at 19-20).

Employer argues that Claimant's testimony that he had no funds for gas and travel to prospective employers is not persuasive because Claimant was receiving temporary total disability benefits during that time frame. Employer also cites the fact that, had Claimant been working at its facility in Newport News, Virginia, Claimant would have necessarily incurred travel costs to and from its worksite. (Employer's Brief, at 22). Employer's main argument, however, relies on the decision by Judge Campbell of this office in *Applewhite v. Newport News Shipbuilding & Dry Dock Co.*, 2003-LHC-1054 (ALJ Oct. 6, 2003). Employer maintains that the issue of whether a claimant is entitled to mileage reimbursement was directly addressed in that case, and that Judge Campbell correctly found that the Act contains no provision for the reimbursement of mileage incurred while participating in vocational rehabilitation programs or for job search activities. Therefore, Employer argues that this issue must be resolved in its favor. (Employer's Brief, at 22-24).

Section 19 of the Act sets forth the functions of the District Director and the Administrative Law Judge. Section 19 must be viewed and taken together with Sections 23 and 27 of the Act, which refer to procedures before and the authority of the District Director and the ALJ. Once a case is transmitted to this office the District Director loses jurisdiction over the claim, and the ALJ assumes the powers, duties, and responsibilities previously vested in the District Director. 33 U.S.C. §919(d).

Hearings before an ALJ are conducted pursuant to the Administrative Procedure Act. 5 U.S.C. §554; 33 U.S.C. §919(d); 20 C.F.R. §702.332. The authority of the ALJ is found at 29 C.F.R. §18.29. Under 20 C.F.R. §702.338, all issues should be adjudicated in one proceeding to avoid piecemeal litigation and procedural delays. *See also Hudnall v. Jacksonville Shipyards*, 17 BRBS 174, 175 (1985). Under Section 702.336, hearings may be expanded to allow consideration of new issues (those not set forth in the parties' pre-hearing statements) if there is evidence presented that warrants consideration of the issue, so long as the parties are notified and

given the opportunity to present argument and new evidence on the issue. *See also Emery v. Bath Iron Works Corp*., 24 BRBS 238, 242-43 (1991).

The parties stated in their respective pre-hearing statements that the primary dispute was as to what type of disability benefits Claimant was entitled. It was only during the course of the hearing that the issue of whether Claimant was entitled to reimbursement for mileage incurred during his participation in the Job Start program was raised. I find that, under 20 C.F.R. §702.336, the hearing was properly expanded to allow consideration of this issue, as evidence was presented by Claimant on this issue; Employer was on notice that this issue would be considered, and was permitted to cross-examine Claimant on the issue; and was permitted to submit evidence post-hearing if it desired to do so. I also find that, under 20 C.F.R. §702.338, it is proper to include the issue of mileage reimbursement among those to be decided in order to adjudicate all of the disputed issues in this case in one proceeding. Therefore, I find that I have the authority to decide whether Claimant is entitled to reimbursement for mileage incurred in seeking alternate employment.

The discussion must now turn to the issue of whether Claimant is entitled to reimbursement for mileage he incurred while participating in the Job Start program. Claimant has pointed to no authority, either in statutory or case law form, that states he is entitled to reimbursement for mileage other than the fact that he was told to record his mileage by Ms. Harvey on forms that were provided to her by the shipyard. Unfortunately, this assertion by Claimant does not suffice to prove his entitlement to reimbursement. Instead, I find persuasive Judge Campbell's statements on this issue. As stated in *Applewhite*, neither Congress nor case law has provided for the reimbursement of travel expenses incurred while searching for alternate employment. Therefore, Claimant's request for reimbursement for mileage incurred while participating in the Job Start program is denied.

Order

Accordingly, it is hereby ordered that:

1. Employer, Newport News Shipbuilding and Dry Dock Company, is hereby ordered to pay to Claimant, Lozie H. Williams, temporary total disability benefits for the periods of: April 21, 2001, through June 5, 2001, inclusive; December 7, 2001, through December 9, 2001, inclusive; April 10, 2003, through April 30, 2003, inclusive; June 3, 2003, through June 26, 2003, inclusive; and August 6, 2003, through September 7, 2003, inclusive;

2. Employer, Newport News Shipbuilding and Dry Dock Company, is hereby ordered to pay to Claimant, Lozie H. Williams, temporary partial disability benefits for the periods of May 1, 2003, and June 2, 2003, and from June 27, 2003, until August 5, 2003, at the compensation rate of $258.81 per week;

3. Claimant's request for reimbursement for mileage incurred while participating in the Job Start program is Denied;

4. Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries;

5. Employer shall receive credit for any compensation already paid;

6. Interest at the rate specified in 28 U.S.C.§1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

7. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

A

RICHARD E. HUDDLESTON
Administrative Law Judge